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2
3 **NOT FOR PUBLICATION**
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5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Duane H Hannan,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.
14

No. CV-18-08150-PCT-SRB

ORDER

15 The Court now considers Petitioner Duane H. Hannan (“Petitioner”)’s *pro se*
16 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition”) (Doc. 1
17 (“Pet.”)). On May 6, 2019, the Magistrate Judge issued a Report and Recommendation,
18 recommending that the Petition be denied. (*See* Doc. 17, R. & R.) On June 19, 2019,
19 Petitioner filed his Objections. (*See* Doc. 20, Objs. to R. & R. (“Obj.”).)

20 **I. BACKGROUND**

21 The background of this case was summarized in the Report and Recommendation
22 and is incorporated in relevant part herein:

23 Pursuant to a plea agreement, on April 10, 2014,
24 Petitioner pleaded guilty to Count 2 in CR201300392, Sexual
25 Conduct with a Minor Under 15 Years of Age, and to Count 1
26 in CR201300725, as amended to Attempted Child Molestation.
27 (Doc. 15-1 at 22-26) Petitioner was represented by separate
28 counsel for each case. (*Id.* at 26) The conviction and sentence
in CR201300725 is not challenged in this habeas matter, but
the case result is referenced for clarity regarding below
proceedings.

1 On May 8, 2014, the superior court sentenced Petitioner
2 to the presumptive term of 20 years' imprisonment on Count 2
3 of CR201300392 followed by community supervision
4 commencing immediately after his term of imprisonment. (*Id.*
5 at 50) In June 2014, Petitioner filed a Notice of Post-
6 Conviction Relief ("PCR") pursuant to Rule 32 of the Arizona
7 Rules of Criminal Procedure and specified he was seeking
8 relief under CR201300725, but he described the charge and
9 sentence associated with CR201300392. (Doc. 15-1 at 56–58)
10 The superior court appointed him counsel. (*Id.* at 60) On
11 August 27, 2014, Petitioner filed another Notice of PCR in
12 superior court, this time identifying CR201300392 as the case
for which he sought relief and listing the charges he was
convicted of under both CR201300725 and CR201300392. (*Id.*
at 62-66) He indicated he was represented by counsel. (*Id.* at
66) The superior court ordered Petitioner's counsel to file a
PCR petition within 60 days or to file a notice she had
identified no colorable claim to assert. (*Id.* at 93)

13 In October 2014, Petitioner filed a motion requesting
14 the production of records. (*Id.* at 95–98) On November 20,
15 2014, he filed "supplements" to his PCR petition under both
16 cases. (*Id.* at 100–122) On November 18, 2014, Petitioner's
17 counsel filed a notice of completion of review in the superior
18 court under CR201300392, averring she had not been able to
19 identify a "tenable issue" to support a PCR action. (*Id.* at 124–
20 125) The superior court dismissed Petitioner's PCR petition.
21 (Doc. 15-2 at 2–5) The judge noted that at the time of
22 Petitioner's change of plea hearing, which he also presided
23 over, he had observed the demeanor of Petitioner and his
24 counsel in CR201300392 and that he concluded Petitioner had
been truthful when he had advised the court his plea had not
been the result of any force, threats, or coercion, and that
Petitioner was not being truthful by asserting in his amended
petition that his trial counsel had "scared him into pleading
guilty." (*Id.* at 3) Petitioner appealed the superior court's ruling
to the Arizona Court of Appeals. (*Id.* at 7)

25 In June 2015, Petitioner filed with the superior court a
26 petition for writ of error *coram nobis*, seeking to assert a
27 speedy trial right claim. (*Id.* at 14–16) The superior court
28 entered a notice stating it lacked jurisdiction to rule on the
petition while Petitioner's appeal was pending in the court of
appeals. (*Id.* at 25) Petitioner timely appealed the superior

1 court's ruling to the court of appeals. (*Id.* at 27, 29–34) He
2 asserted: (1) the buccal swab evidence was taken illegally; (2)
3 the state improperly refused to disclose all recordings of police
4 interviews with the victims and failed to disclose
5 inconsistencies in the statements of the victim in
6 CR201300392, violating his state and federal constitutional
7 protections; (3) county detention officials improperly removed
8 exculpatory letters written by the victims from his jail cell,
9 violating his Sixth Amendment rights; and (4) his trial counsel
10 coerced him to plead guilty by telling him he would be
11 sentenced to 54 years' imprisonment if he did not take the
12 offered plea agreement. (*Id.*) In November 2015, Petitioner
submitted a document to the court of appeals captioned as an
amendment to his opening brief, asserting a speedy trial
violation under state and federal constitutions and rules. (*Id.* at
66–68) The court of appeals denied Petitioner's motion to
amend his petition as “unnecessary.” (*Id.* at 73)

13 The Arizona Court of Appeals filed its decision on the
14 petition for review in March 2017, denying relief. (Doc. 15-2
15 at 96–99) Although Petitioner filed a notice of appeal in the
16 court of appeals declaring he would seek review in the Arizona
17 Supreme Court, the record indicates he failed to file a petition
18 for review in the state high court and also did not file a motion
for reconsideration in the court of appeals. Because Petitioner
did not make either of these two filings, the court of appeals
issued its mandate on April 21, 2017. (*Id.* at 95)

19 Petitioner filed a second PCR petition in CR201300392
20 with the superior court on May 4, 2017. (Doc. 15-2 at 103–
21 105) He asserted that “speedy trial rights were exceeded but
22 [were] unknown to Petitioner until October 2014[.]” and that
23 newly discovered evidence existed that would have changed
24 his verdict or sentence. (*Id.* at 104) He indicated he was raising
25 an ineffective assistance of counsel (“IAC”) claim. (*Id.* at 104)
26 The superior court denied appointment of counsel and
27 dismissed Petitioner's second notice of PCR pursuant to
28 Arizona Rule of Criminal Procedure 32(a)(3), stating that
Petitioner had waived his claim when he entered his guilty plea
and in any event did not raise it in his first PCR action. (*Id.* at
109–110) Petitioner filed a notice of appeal in the superior
court stating he was seeking review in the Arizona Court of
Appeals. (Doc. 15-3 at 2, 3) The court of appeals treated
Petitioner's action as a petition for review and conducted a

1 review of the record. (*Id.* at 5–6) The court dismissed the
2 petition for review because it was untimely pursuant to Arizona
3 Rule of Criminal Procedure 32.9(c). (*Id.* at 5) Petitioner filed a
4 petition for review in the Arizona Supreme Court in which he
5 argued his speedy trial violation claim and his argument that
6 the DNA buccal swab from his victim’s child was illegally
7 obtained. (*Id.* at 11–13) The supreme court denied review
8 without discussion by order dated February 14, 2018. (*Id.* at
9 35)

10 (R. & R. at 2–6.)

11 On July 9, 2018, Petitioner filed his Petition, asserting four grounds for relief: (1)
12 the State knowingly violated his speedy trial rights guaranteed by the United States and
13 Arizona Constitutions (“Ground One”); (2) DNA evidence of the newborn child of one of
14 his victims was collected in violation of the Fourth Amendment (“Ground Two”); (3) the
15 State violated Petitioner’s right to present evidence in his own defense when exculpatory
16 letters from his victims “came up missing” during a cell transfer (“Ground Three”); and (4)
17 Petitioner’s due process rights were violated when the State denied him “use of court
18 records, evidence compiled by [the] State, actual interviews, and DNA chain of custody
19 and results” in his first state PCR proceeding (“Ground Four”). (“Pet.” at 6–9.) The
20 Magistrate Judge rejected every ground and recommended the Court deny the Petition. (R.
21 & R. at 1.) Petitioner raises four objections: (1) the Petition is timely (“Objection One”);
22 (2) Petitioner’s claims are cognizable in habeas (“Objection Two”); (3) Petitioner’s guilty
23 plea did not waive his claim involving the missing victim letters (“Objection Three”); and
24 (4) Petitioner did not procedurally default his claims (“Objection Four”). (Obj. at 3–15.)

25 **II. LEGAL STANDARD AND ANALYSIS**

26 A district court “shall make a de novo determination of those portions of the report
27 . . . to which objection is made,” and “may accept, reject, or modify, in whole or in part,
28 the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C).
The court need review only those portions objected to by a party, meaning the court can
adopt without further review all portions not objected to. *See United States v. Reyna–Tapia*,

1 328 F.3d 1114, 1121 (9th Cir. 2003).

2 **A. Objection One: Timeliness**

3 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) requires a
4 state prisoner to file a federal habeas petition within one year of “the date on which the
5 judgment became final by the conclusion of direct review or the expiration of time for
6 seeking such review.”¹ 28 U.S.C. § 2244(d)(1)(A). For plea-convicted defendants in
7 Arizona, Rule 32’s “of-right proceeding” is one form of “direct review” within the meaning
8 of 28 U.S.C. § 2244(d)(1)(A). *Summers v. Schriro*, 481 F.3d 710, 716–17 (9th Cir. 2007);
9 *see* Ariz. R. Crim. P. 32. Rule 32’s of-right proceeding includes both “the first post-
10 conviction proceeding,” in which prisoners may challenge their conviction, custody, or
11 sentence, “as well as the timely filed proceeding that follows it,” in which prisoners may
12 challenge the effectiveness of counsel in the first proceeding. *Osterkamp v. Browning*, 250
13 P.3d 551, 554 n.1, 555–56 (Ariz. Ct. App. 2011). This second proceeding protects the due
14 process right to effective assistance of counsel in what, for the pleading defendant, is
15 effectively his first appeal of right. *Id.* at 556; *see also* *Pennsylvania v. Finley*, 481 U.S.
16 551, 555 (1987) (recognizing the right to counsel in first appeal of right). In other words, a
17 conviction made in Arizona pursuant to a plea agreement becomes “final”—and AEDPA’s
18 one-year clock begins to run—when a timely initiated second PCR proceeding concludes
19 and the time for seeking review expires.

20 Because Petitioner was convicted pursuant to a plea agreement, his of-right Rule 32
21 proceeding was a form of direct review. (*See* Doc. 15-1, Plea Agreement at 22–26.) As
22 such, AEDPA’s one-year clock did not begin to run until this proceeding concluded and
23 the time, if any, for seeking further review expired. Under *Osterkamp*, this proceeding
24 included Petitioner’s first PCR proceeding, in which he challenged his conviction, and his
25 second PCR proceeding, if it was properly filed and if in it, he challenged the effectiveness
26 of counsel in the first proceeding. (Doc. 15-1, June 18, 2014 Notice of PCR at 56–58; Doc.
27 15-2, May 8, 2017 Notice of PCR at 103–05.)

28 ¹ While there are other triggers for starting the running of the statute of limitations, none is
relevant here. *See* 28 U.S.C. § 2244(d)(1)(B)–(D).

1 Parties and the Magistrate Judge disagree over whether the second PCR notice was
2 properly filed. The Magistrate Judge determined the second PCR notice was not properly
3 filed because it raised an untimely speedy trial claim. (R. & R. at 11–12.) Petitioner argues
4 that a state PCR notice raising timely claims is not improperly filed simply because it also
5 raises untimely claims, and that he timely raised an ineffective assistance of counsel claim.
6 (Obj. at 4; *see id.* (conceding the speedy trial claim was untimely)). When the state PCR
7 court has not “clearly ruled” on the timeliness of a state PCR filing, it is the responsibility
8 of the habeas court to consider whether the state PCR filing was timely as a matter of state
9 law before counting days toward AEDPA’s one-year limit. *Carey v. Saffold*, 536 U.S. 214,
10 226–27 (2002); *see also Evans v. Chavis*, 546 U.S. 189, 198 (2006) (“[T]he [federal court]
11 must itself examine the delay in each case and determine what the state courts would have
12 held in respect to timeliness.”). The state PCR court did not clearly rule on the timeliness
13 of Petitioner’s second PCR notice: it dismissed Petitioner’s second PCR notice after
14 apparently evaluating its merits. (*See* Doc. 15-2, June 6, 2017 Order at 109–10 (“[A] review
15 of the record shows [Petitioner’s claim] has no merit[.]”).) It is therefore the Court’s
16 responsibility to consider whether the second PCR notice was timely and otherwise
17 properly filed.

18 Arizona Rule of Criminal Procedure 32.4(a)(2)(C) permits a defendant to “raise an
19 of-right claim of ineffective assistance of Rule 32 counsel in a successive Rule 32 notice”
20 within “30 days after the final order or mandate in the defendant’s of-right petition for post-
21 conviction relief.” The appellate court issued its mandate on April 21, 2017, so Petitioner
22 had thirty days, or until May 22, 2017, to file a notice claiming ineffective assistance of
23 counsel in his first Rule 32 proceeding. Petitioner filed a notice on May 8, 2017 and
24 checked a box indicating he was “raising a claim of ineffective assistance of counsel.” (*See*
25 Doc 15-2, Notice of Post-Conviction Relief, at 103–05.) This arguably satisfied Rule 32.4’s
26 filing requirements.²

27
28 ² *See Osterkamp*, 250 P.3d at 555 (“In an of-right proceeding, a ‘timely’ notice . . .
[includes] a notice filed within thirty days . . . after this court issues its mandate.”); *Pruett*,

1 The State argues that Rule 32.4's thirty-day deadline to file an ineffective assistance
2 of counsel claim does not apply because "no claim of ineffective assistance of PCR counsel
3 was asserted in the second PCR proceeding." (Doc. 21, Resp. to Obj. ("Resp.") at 3.) The
4 State reasons that, while Petitioner checked the box indicating he was "raising a claim of
5 ineffective assistance of counsel," on that same form, Petitioner also indicated that he did
6 not have previous appellate or PCR counsel. (Resp. at 3–4.) Thus, the state PCR court
7 "reasonably interpreted the second PCR proceeding's checked-box IAC claim as a claim
8 concerning *trial* counsel." (Resp. at 4 (emphasis in original).) But this argument is
9 misdirected: because the state PCR court did not "clearly rule[]" on the timeliness of the
10 notice, its understanding of Petitioner's IAC claim as concerning trial counsel is irrelevant.
11 And the Supreme Court has directed that "[t]he handwritten pro se document is to be
12 liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A liberal construction is
13 particularly appropriate where, as here, such a construction would further the purpose of
14 Rule 32's second proceeding: to permit defendants "to allege that the attorney appointed
15 in the first PCR proceeding was constitutionally ineffective." *Powell v. Ryan*, No. CV-14-
16 02043-TUC-RM, 2016 WL 4473066, at *2 (D. Ariz. Aug. 25, 2016); *see also Osterkamp*,
17 250 P.3d at 556.

18 Because Petitioner used the proper form, in compliance with Arizona Rule of
19 Criminal Procedure 32.4(a)(3), to file his second PCR notice within 30 days of conclusion
20 of the first, in compliance with Arizona Rule of Criminal Procedure 32.4(a)(2)(C), and
21 indicated he sought to raise a claim of ineffective assistance of counsel, arguably in
22 compliance with *Rosales* and other Arizona case law, the Court assumes that Petitioner's

23 912 P.2d at 1360 (holding that pleading defendant's second notice of PCR raising a claim
24 of ineffectiveness of previous PCR counsel is timely if filed within thirty days of mandate
25 affirming denial of first PCR petition); *State v. Rosales*, 66 P.3d 1263, 1266 (Ariz. Ct. App.
26 2003) (finding "no fatal flaws on the face of petitioner's [second] notice of post-conviction
27 relief" where "the notice merely noted the possibility that a claim of ineffective assistance
28 of counsel might be raised" and did not "purport to set forth in the notice an exhaustive list
of the claims to be raised in the petition"). Arizona's rules permitted Petitioner to follow
up his second PCR notice with a corresponding petition, which could have expounded upon
any ineffective assistance of counsel claim raised in the notice. *See* Ariz. R. Crim. P.
32.4(a), (c).

1 second PCR notice was properly filed. Under that assumption, Petitioner’s second PCR
2 proceeding concluded on February 14, 2018, when the Arizona Supreme Court denied
3 review of the Arizona Court of Appeal’s affirmation of the state PCR court’s dismissal of
4 his second PCR notice. (Doc 15-3, Feb. 14, 2018 Order at 35.) Petitioner’s time for seeking
5 review in the United States Supreme Court expired on May 15, 2018, ninety days after his
6 second PCR notice was denied.³ His AEDPA one-year clock began to run the next day, on
7 May 16, 2018. *See Patterson v. Stewart*, 251 F.3d 1243, 1245–47 (9th Cir.2001) (AEDPA’s
8 limitations period begins to run on the day after the triggering event pursuant to Fed. R.
9 Civ. P. 6(a)). When Petitioner filed his Petition on July 9, 2018, then, only 54 days of his
10 one-year limit had expired.⁴ Because his Petition is arguably timely, the Court sustains
11 Objection One.

12 **B. Objection Two: Cognizability**

13 “District courts adjudicating habeas petitions under § 2254 are instructed to
14 summarily dismiss claims that are clearly not cognizable.” *Clayton v. Biter*, 868 F.3d 840,
15 845 (9th Cir. 2017). “[F]ederal habeas corpus relief does not lie for errors of state law.”
16 *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (quotation and citations omitted); *see also*
17 28 U.S.C § 2254(a) (state prisoner may seek habeas relief “only on the ground that he is in
18 custody in violation of the Constitution or laws or treaties of the United States”).

19 *i. Ground One*

20 Ground One asserts a speedy trial violation under the United States and Arizona

21
22 ³ *See Bowen v. Roe*, 188 F.3d 1157, 1158–59 (9th Cir. 1999) (“[T]he period of ‘direct
23 review’ in 28 U.S.C. § 2244(d)(1)(A) includes the period within which a petitioner can file
24 a petition for a writ of certiorari from the United States Supreme Court, whether or not the
25 petitioner actually files such a petition.”); Sup. Ct. R. 13 (ninety days to file petition for
writ of certiorari); *see also Torres v. Ryan*, No. CV08-952-PHX-NVW, 2009 WL 1846830,
at *2 (D. Ariz. June 26, 2009) (recognizing that plea-convicted state prisoners can seek
review in the United States Supreme Court after conclusion of direct review in state court,
which may include Rule 32 proceedings).

26 ⁴ The time between the Arizona Court of Appeal’s mandate following the first PCR
27 proceeding and Petitioner’s filing of the second PCR notice did not start AEDPA’s one-
year clock because the second PCR proceeding is best understood as “part of a single round
28 of [state] habeas relief[.]” *See Banjo v. Ayers*, 614 F.3d 964, 968 (9th Cir. 2010) (citing
Evans v. Chavis, 546 U.S. 189, 191–93 (2006)); *see also Osterkamp*, 250 P.3d at 555–56
 (“[T]he of-right proceeding includes the first post-conviction proceeding as well as the
timely filed proceeding that follows it.”).

1 Constitutions. (*See* Pet. at 6.) To the extent that Ground One is based on the Arizona
2 Constitution—state law—it is not cognizable in habeas. Petitioner argues that the
3 Magistrate Judge erred in concluding otherwise because “an error of state law that amounts
4 to a due process violation can be raised in habeas.” (Obj. at 6.) But Petitioner does not
5 argue that Ground One amounts to a violation of due process; he argues it amounts to a
6 violation of the speedy trial guarantee of the Arizona Constitution. (Pet. at 6.) This
7 argument is not cognizable in habeas. Objection Two, as applied to Ground One’s Arizona
8 Constitution claim, is overruled.

9 *ii. Ground Three*

10 Ground Three—that county detention officials improperly removed from
11 Petitioner’s jail cell exculpatory letters written by his victims, violating his right to present
12 a defense—is similarly unreviewable. (*See* Pet. at 8.) Absent a demonstration of cause and
13 prejudice, habeas courts cannot review state application of state procedural rules. *Martinez*
14 *v. Ryan*, 926 F.3d 1215, 1224–25 (9th Cir. 2019). At best, Ground Three alleges that state
15 procedural rules governing the production of documents resulted in Petitioner’s inability
16 to use the letters. (*See* R. & R. at 13 (interpreting Ground Three as such).) Petitioner’s
17 claim that *Britt v. North Carolina*⁵ and *Lane v. Brown*⁶ stand for a contrary proposition is
18 incorrect. (*See* Obj. at 7.) *Britt* and *Lane* involved alleged denials of the Fourteenth
19 Amendment’s equal protection guarantee after state trial courts refused to grant free copies
20 of transcripts to indigent defendants. *Britt*, 404 U.S. at 227; *Lane*, 372 U.S. at 482–83.
21 Petitioner, in contrast, alleges no equal protection violation in connection with the missing
22 victim letters and raises no colorable claim that the missing letters deprived him of due
23 process. (*See* Obj. at 9–11.) Because Ground Three involves a state court’s application of
24 state procedural rules, and Petitioner demonstrates no cause or prejudice, Ground Three is
25 not cognizable in habeas. Objection Two, as applied to Ground Three, is overruled.

26 *iii. Ground Four*

27 Ground Four—presented by Petitioner as a claim that the State violated his due

28 ⁵ 404 U.S. 226 (1971).

⁶ 372 U.S. 477 (1963).

1 process rights by not providing him documents in his first PCR proceeding—was construed
2 by the Magistrate Judge as a claim of ineffective assistance of PCR counsel. (Pet. at 9; R.
3 & R. at 15.) Petitioner accepts this characterization but objects to the Magistrate Judge’s
4 conclusion that Ground Four is noncognizable, arguing that the Magistrate Judge based
5 this conclusion on an incorrect premise: that Petitioner was not constitutionally entitled to
6 counsel in his first state PCR proceeding. (Obj. at 8–9.) Petitioner is correct.

7 Citing *Coleman v. Thompson*,⁷ the Magistrate Judge reasoned that “[t]here is no
8 constitutional right to an attorney in state [PCR] proceedings” so “a petitioner cannot claim
9 constitutionally ineffective assistance of counsel in such proceedings.” (R. & R. at 15.) But
10 in Arizona, there is a constitutional right to an attorney in certain PCR proceedings:
11 *Coleman*’s rule does not apply when non-capital, plea-convicted defendants pursue relief
12 through Rule 32. When “a defendant who pleads guilty in a non-capital case waives his
13 right to a direct appeal,” Rule 32 proceedings become “the sole available avenue” for that
14 defendant to exercise his constitutional right to appellate review. *Ree v. Ryan*, No. CV-13-
15 00746-TUC-RM, 2015 WL 3889360, at *1 (D. Ariz. June 23, 2015) (citing *Pruett*, 912
16 P.2d at 1359–60); *see also Summers*, 481 F.3d at 711 (holding that Arizona’s Rule 32 of-
17 right proceeding is a form of “direct review” for pleading defendants). Because Rule 32 is
18 a non-capital pleading defendant’s sole opportunity for direct review, prisoners pursuing
19 Rule 32 relief are constitutionally entitled to effective assistance of counsel. *Id.* (citing
20 *Pruett*, 912 P.2d at 1360); *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (“A first
21 appeal as of right therefore is not adjudicated in accord with due process of law if the
22 appellant does not have the effective assistance of an attorney.”); *see also Ramon v. Ryan*,
23 2010 WL 3564819, at *11 (D. Ariz. July 23, 2010) (Arizona pleading defendant has a right
24 to counsel in his Rule 32 of-right post-conviction proceeding); *Walker v. Ryan*, 2015 WL
25 10575864, at *5 (D. Ariz. Oct. 21, 2015) (same). Therefore, a claim of ineffective
26 assistance of counsel in a pleading defendant’s Rule 32 proceeding is just as reviewable as
27 a claim of ineffective assistance of appellate counsel in a nonpleading defendant’s direct
28

⁷ 501 U.S. 722, 752 (1991).

1 appeal. *Osterkamp*, 250 P.3d at 557 (Rule 32 proceeding is “the procedural equivalent of a
2 first appeal”). The Magistrate Judge erred in concluding otherwise.

3 Nevertheless, Ground Four is unreviewable because it was procedurally defaulted.
4 In his first state PCR proceeding, Petitioner requested production of the documents
5 referenced in Ground Four, and the state PCR court denied these requests on the basis of
6 state procedural law. (*See* Doc. 15-1, Request for Prep. of PCR Record at 90; Doc 15-1,
7 Mot. to Request Prod. of Records at 95–98, 105–08; Doc. 15-2, Apr. 20, 2015 Order at 4.)
8 “[A] federal court may not review federal claims that were procedurally defaulted in state
9 court—that is, claims that the state court denied based on an adequate and independent
10 state procedural rule.” *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). Because the
11 documents were denied based on a state procedural rule independent of any federal
12 question and adequate to support the denial, the Court cannot review this denial, or
13 counsel’s role, if any, in this denial.

14 **C. Objection Four: Procedural Default**

15 *iv. Ground One*

16 Petitioner objects to the Magistrate Judge’s conclusion that Ground One, to the
17 extent it alleges a speedy trial violation under the United States Constitution, was
18 procedurally barred because he failed to raise it in his first state PCR action when he knew
19 of it but failed to assert it, and would now be prohibited from raising it under Arizona Rule
20 of Criminal Procedure 32.2(a)(3). (R. & R. at 17 (citing Doc. 15-2, June 6, 2017 Order at
21 110).) In his Objections, Petitioner recasts Ground One as an ineffective assistance of
22 counsel claim, arguing that because he was “deprived of counsel on his timely as of-right
23 second PCR . . . it is not appropriate to attribute any procedural violation [in the first PCR]
24 to him.” (Obj. at 12.) The Court may decline to consider new allegations presented for the
25 first time in objections. *See United States v. Howell*, 231 F.3d 615, 621–22 (9th Cir. 2000).
26 Because Petitioner only now presents Ground One as an ineffective assistance of counsel
27 claim, the Magistrate Judge had no opportunity to consider it. The Court therefore
28 considers Ground One as presented in the Petition: “[the] State knowingly violated

1 Petitioner’s right to a speedy trial [in violation of the] U.S. Constitution.” (Pet. at 6.) The
2 Magistrate Judge correctly concluded that by failing to properly raise this claim in his first
3 PCR action, Petitioner failed satisfy the exhaustion requirements set forth in *Baldwin v.*
4 *Reese*⁸ and *Casey v. Moore*.⁹ (R. & R. at 17.) Moreover, by pleading guilty, Petitioner
5 waived any speedy trial violation. *See Ortberg v. Moody*, 961 F.2d 135, 136–38 (9th Cir.
6 1992) (holding that guilty plea barred habeas consideration of claims alleging, among other
7 things, denial of right to speedy trial). In any event, the state PCR court independently
8 reviewed the record for a speedy trial violation, and found none. (Doc. 15-2, June 6, 2017
9 Order at 109–10.) Objection Four, as applied to Ground One, is overruled.

10 v. Ground Two

11 Ground Two—that a buccal swap was illegally collected from a baby of one of
12 Petitioner’s victims, in violation of Petitioner’s Fourth Amendment rights—is also
13 procedurally barred. The Magistrate Judge concluded that Ground Two is unreviewable in
14 habeas because at the trial court level Petitioner neither moved to suppress this evidence
15 nor argued he was prevented from moving to suppress the evidence. (R. & R. at 13.)
16 Petitioner objects only on the basis that Ground Two is “[p]roperly considered” as “one of
17 IAC, not an independent claim.” (Obj. at 8.) As with Ground One, the Court declines to
18 consider this argument because it was raised for the first time in his Objections. *See Howell*,
19 231 F.3d at 621–22.

20 Even if the Court accepted Petitioner’s recharacterization, and agreed that
21 Petitioner’s trial counsel should have filed a motion to suppress the buccal-swab evidence,
22 Petitioner’s guilty plea renders this claim moot. A valid guilty plea “results in the
23 defendant’s loss of any meaningful opportunity he might otherwise have had to challenge
24 the admissibility of evidence obtained in violation of the Fourth Amendment.” *Haring v.*
25 *Prosise*, 462 U.S. 306, 320 (1983). “[W]hen a defendant is convicted pursuant to his guilty
26 plea rather than a trial, the validity of that conviction cannot be affected by an alleged
27 Fourth Amendment violation because the conviction does not rest in any way on evidence

28 ⁸ 541 U.S. 27, 29 (2004).

⁹ 386 F.3d 896, 916 (9th Cir. 2004).

1 that may have been improperly seized.” *Id.* at 321. As Petitioner presents no colorable
2 claim that his plea was coerced or otherwise invalid, Objection Four, as applied to Ground
3 Two, is overruled.

4 **D. Objection Three: Claims Waived by Guilty Plea**

5 Because the Court concludes that Ground Three is noncognizable, the Court does
6 not reach Objection Three—that by pleading guilty, Petitioner did not waive his claim
7 regarding the missing victim letters. (*See* Obj. at 9–11.) In any event, Objection Three is
8 meritless. Petitioner cites *Class v. United States*¹⁰ to support Objection Three. (Obj. at 9–
9 10.) But *Class* reiterates that a valid guilty plea “renders irrelevant—and thereby prevents
10 the defendant from appealing—the constitutionality of case-related government conduct
11 that takes place before the plea is entered.” *Id.* at 805. By signing a guilty plea, Petitioner
12 admitted to the crimes the missing victim letters would allegedly exculpate him of—
13 rendering any claim regarding the missing letters irrelevant to his current custody. *See id.*
14 (stating a guilty plea “is, of course, a confession of all the facts charged in the indictment”)
15 (citing *Commonwealth v. Hinds*, 101 Mass 209, 210 (1869) (quotation omitted)).

16 **III. CONCLUSION**

17 Because the Court finds Petitioner’s Petition arguably timely, it sustains Objection
18 One. The Court overrules Objections Two, Three, and Four. The Court adopts the Report
19 and Recommendation in relevant part and denies and dismisses the Petition with prejudice.

20 **IT IS ORDERED** sustaining Objection One raised in the Objections to Magistrate
21 Judge’s Report and Recommendation (Doc. 20).

22 **IT IS FURTHER ORDERED** overruling Objections Two, Three, and Four raised
23 in the Objections to Magistrate Judge’s Report and Recommendation (Doc. 20).

24 **IT IS FURTHER ORDERED** adopting in relevant part the Report and
25 Recommendation of the Magistrate Judge as the Order of this Court (Doc. 17).

26 **IT IS FURTHER ORDERED** denying and dismissing with prejudice the Petition
27 Under 28 U.S.C. § 2254 For a Writ of Habeas Corpus by a Person in State Custody

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¹⁰ 138 S. Ct. 798 (2018).

1 (Doc. 1).

2 **IT IS FURTHER ORDERED** denying any Certificate of Appealability and leave
3 to proceed in forma pauperis on appeal. The dismissal of the Petition is justified because
4 Petitioner has not made a substantial showing of the denial of a constitutional right.

5 **IT IS FURTHER ORDERED** directing the Clerk to enter judgment accordingly.

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7 Dated this 24th day of September, 2019.

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12 Susan R. Bolton
13 United States District Judge
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